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PUBLIC SERVICE
COMMISSION

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In re:)	
)	
Enforcement of Interconnection Agreement)	
Between BellSouth Telecommunications, Inc. and)	Case No. 2004-00295
NuVox Communications, Inc.)	

MOTION FOR PROCEDURAL ORDER

NuVox Communications, Inc. (“NuVox”), through its counsel, respectfully requests that the Kentucky Public Service Commission (“Commission”) adopt a procedural order in the above-referenced proceeding. Specifically, NuVox requests that the Commission: (1) adopt and incorporate the record compiled in the nearly identical proceeding that already has been litigated before the Georgia Public Service Commission (“Georgia Commission”)¹ into the record in the above-captioned case; (2) adopt the same legal conclusions reached by the Georgia Commission, as described herein; (3) to the extent that the Commission considers adopting legal conclusions that differ from those described herein, establish a schedule for oral argument and briefing; and (4) with respect to the Kentucky-specific factual issues that will need to be decided, including, whether BellSouth Telecommunications, Inc. (“BellSouth”) has demonstrated a concern with respect to the fifteen (15) converted EEL circuits it seeks to audit and the novel legal/factual issue of whether BellSouth would in any instance be entitled to interest, establish a schedule for pre-filed testimony and a limited evidentiary hearing and, in so doing, limit such pre-filed

¹ See *Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.*, Georgia Commission Docket No. 12778-U, filed in this docket by NuVox, August 17, 2004.

testimony to BellSouth pre-filed direct and NuVox pre-filed rebuttal and require BellSouth to produce all evidence upon which it seeks to rely with its pre-filed direct testimony.

I. THE COMMISSION SHOULD INCORPORATE THE RECORD COMPILED IN THE GEORGIA PROCEEDING AND SET A SCHEDULE FOR PRE-FILED TESTIMONY AND AN EVIDENTIARY HEARING THAT ARE LIMITED IN SCOPE TO KENTUCKY SPECIFIC ISSUES

In lieu of submitting pre-filed direct and rebuttal testimony in this proceeding that would substantially duplicate the efforts made by both parties in the already litigated Georgia complaint docket, NuVox respectfully submits that the Commission should incorporate and adopt the record compiled in the proceeding before the Georgia Commission (including the hearing transcript and written submissions of the parties) into this proceeding.² In so doing, the Commission should limit additional pre-filed testimony and exhibits to the Kentucky-specific issues in dispute – including whether BellSouth has demonstrated a concern with respect to the fifteen (15) converted EELs circuits that it seeks to audit and whether BellSouth, in any instance, would be entitled to interest.³

NuVox and BellSouth have entered into a multi-state Interconnection Agreement that governs their relationship throughout the BellSouth region. Although each state has approved the Agreement separately, the relevant provisions of the Agreement do not vary in any state.⁴

² Upon request, NuVox will furnish the Commission with copies of its complete filings, the transcript, and the hearing officer recommendation.

³ On several occasions, NuVox has requested that BellSouth provide documentation supporting its allegations of concern. To date, BellSouth has been unable or unwilling to provide any. For more than two years now, NuVox has informed BellSouth that it may proceed with an audit of any converted circuit for which it demonstrates a concern once it hires and pays for an independent auditor that will perform an audit in compliance with AICPA standards. While NuVox has made plain its willingness to abide by the Agreement, BellSouth intransigently continues to insist on far more than it is entitled to under the Agreement.

⁴ See NuVox Answer at 3 (noting that the parties submitted the Agreement to each state commission separately, and each state commission has approved the Agreement).

The Agreement is to be interpreted in accordance with Georgia law by the Commission and its counterparts in the other eight states where BellSouth operates as the dominant incumbent.⁵ As explained more fully in NuVox's concurrently filed Opposition to BellSouth's Motion for Summary Disposition, the Georgia Commission's decisions (sought by BellSouth in a complaint filed more than two years earlier than the one filed here in Kentucky) on the same legal issues raised in this matter are now part of governing Georgia law. The relevant provisions of the Agreement, which do not differ in any state, do not mean different things in different states.

BellSouth has raised two primary legal issues in its complaint, each of which, the Georgia Commission already has resolved under the same language in the identical Agreement: (1) whether BellSouth is required to demonstrate a concern prior to conducting an audit, and (2) whether BellSouth must appoint an independent auditor to conduct the audit in compliance with AICPA standards. On each issue, the Georgia Commission found in the affirmative and in so doing ruled in NuVox's favor.⁶ BellSouth did not challenge either of these decisions in its petition for reconsideration of the Georgia Order.⁷

⁵ See Agreement, General Terms and Conditions, § 23 (stating that the Agreement is "governed by, and construed in accordance with, the laws of the state of Georgia.").

⁶ See Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc., Georgia Commission Docket No. 12778-U, Order Adopting in Part and Modifying in Part the Hearing Officer's Recommended Order, at 5-8, 12-14 (June 29, 2004) ("Georgia Order"). Notably, the Georgia Commission record makes clear that the auditor proposed by BellSouth, American Consultants Alliance (ACA), cannot itself certify AICPA compliance and cannot be deemed to be free from the influence of BellSouth (e.g., private mid-audit conversations seeking "help" from BellSouth).

⁷ See BellSouth Telecommunications, Inc.'s Motion for Rehearing, Reconsideration, and Clarification Docket No. 12778-U (July 7, 2004). On August 24, 2004, the Georgia Commission adopted an Order on Reconsideration denying BellSouth's requests to reconsider its decision regarding the limited scope of the audit and BellSouth's obligation to pay for the audit, regardless of the result. BellSouth appealed the Order on Recon on or about September 23, 2004. See *BellSouth Telecommunications Inc. v. NuVox Communications Inc. & the Georgia Public Service Commission*, 04-CV-2790, U.S.D.C., Northern District of Georgia (filed Sept. 23, 2004).

Several ancillary legal issues raised by BellSouth here also were addressed by the Georgia Commission. These issues, included (1) the scope of the audit, (2) which party must pay for an AICPA-compliant audit, and (3) the extent to which BellSouth could disclose customer proprietary network information or carrier proprietary information to an independent auditor. In finding that: (1) that the scope of the audit should be limited to those circuits for which BellSouth had demonstrated a concern,⁸ (2) BellSouth must pay for an AICPA-compliant audit regardless of the result,⁹ and (3) that BellSouth may not release CPNI information with permission from the carrier to which the information pertains,¹⁰ the Georgia Commission again ruled in NuVox's favor.¹¹

Because BellSouth has asked the Commission to decide the same issues as those that were before the Georgia Commission (with the exception of whether BellSouth must pay for the audit – which it repeatedly has said that it would, regardless of the outcome), interpreting the same Agreement under Georgia law (which also applies to the Agreement in Kentucky),¹² incorporating the pleadings prepared in the Georgia proceeding, the evidentiary record compiled

⁸ *Georgia Order* at 11.

⁹ *Id.* at 14.

¹⁰ *Id.* at 11-12. BellSouth requested that the Georgia Commission clarify that its order was not intended to preclude the disclosure of CPNI under section 222(d) of the Act. The Georgia Commission granted the request for clarification by concluding that its order did not address section 222(d) of the Act. At the same time, however, the Georgia Commission expressly indicated that its decision did not mean that it agreed with BellSouth's position with respect to the disclosure of CPNI or the Georgia Commission's jurisdiction to engage in enforcement related thereto. Thus, the Georgia Commission warned BellSouth that any disclosure of CPNI would be done at BellSouth's own risk.

¹¹ With this track record established, NuVox thinks it was well founded in describing the Georgia Commission's decision as vindicating NuVox's stance in this two-and-a-half year battle with BellSouth. Yes, BellSouth gets an audit – but only the audit that NuVox said it could have all along.

¹² *See* Agreement, General Terms and Conditions, § 23 (stating that the Agreement is “governed by, and construed and enforced in accordance with, the laws of the state of Georgia.”).

and the Georgia Commission's Order into this proceeding would facilitate the Commission's expeditious and economical resolution of the issues raised in this proceeding. NuVox respectfully requests that the Commission order such incorporation of the Georgia Order, record and pleadings. NuVox also respectfully requests that the Commission adopt the same legal conclusions referenced above as reached by the Georgia Commission.

In addition, the Georgia Commission's conclusions with respect to the ancillary issues raised are sound and BellSouth has not demonstrated otherwise. Accordingly, NuVox requests that the Commission adopt the Georgia Commission's decisions that: (1) limited the scope of the audit to those converted EEL circuits for which a concern has been demonstrated,¹³ (2) affirmed BellSouth's commitment to pay for an AICPA compliant audit,¹⁴ and (3) found that BellSouth may not disclose CPNI or CPI without the permission of the carrier to which such information pertains.¹⁵ To the extent that the Commission considers adopting conclusions other than these, NuVox respectfully requests opportunity for oral argument and briefing.

With respect to the Kentucky specific issues that will need to be decided, including whether BellSouth has demonstrated a concern with respect to the fifteen (15) converted EEL circuits it seeks to audit, NuVox requests that the Commission, subsequent to its adoption of legal conclusions, as requested above, establish a schedule for pre-filed testimony and a limited evidentiary hearing.¹⁶ Such pre-filed testimony and hearing also should encompass the issue

¹³ *Georgia Order* at 11.

¹⁴ *Id.* at 14; *see also* Georgia Commission Staff Recommendation at 4.

¹⁵ *Id.* at 11-12. NuVox also asks the Commission to affirm that any audit would be of NuVox's records only and not of documents furnished to the auditor by BellSouth.

¹⁶ NuVox estimates that an evidentiary hearing, of limited scope as described herein, would last less than a day and involve the testimony of one or two witnesses on behalf of NuVox.

(new to this complaint) that BellSouth should be entitled to interest in some manner.¹⁷ In this regard, so as to avoid the ambush tactics employed repeatedly by BellSouth in the Georgia case, NuVox requests that the Commission limit such pre-filed testimony to BellSouth pre-filed direct and NuVox pre-filed rebuttal and require BellSouth to produce all evidence upon which it seeks to rely with its pre-filed direct testimony.

II. CONCLUSION

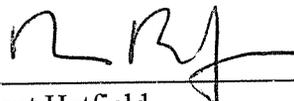
For the foregoing reasons, NuVox respectfully requests that the Commission:

- (1) incorporate into the record of this proceeding the Georgia Order, record and pleadings;
- (2) adopt the same legal conclusions reached by the Georgia Commission, as described above;
- (3) to the extent that the Commission considers adopting legal conclusions that differ from those described herein, establish a schedule for oral argument and briefing;
- (4) with respect to the Kentucky specific issues that will need to be decided, including, whether BellSouth has demonstrated a concern with respect to the fifteen (15) converted EEL circuits it seeks to audit and the legal/factual issue of whether BellSouth would in any instance be entitled to interest, establish a schedule for pre-filed testimony and a limited evidentiary hearing and limiting such pre-filed testimony to BellSouth pre-filed direct and NuVox pre-filed rebuttal and requiring BellSouth to produce all evidence upon which it seeks to rely with its pre-filed direct testimony.

¹⁷ BellSouth asserts no basis for this claim as there is no basis for it.

Respectfully submitted,

NuVox Communications, Inc.



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Certificate of Service

The undersigned hereby certifies that on this the 30th day of September, 2004, a true and correct copy of the foregoing has been forwarded via first class U. S. Mail, hand delivery, overnight delivery, or facsimile transmission to the following.

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